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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1020

W.W.I.Z., INC.
and
SANFORD A. SCHAFITZ,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION.

Respondent,

and

ELYRIA-LORAIN BROADCASTING COMPANY,

Intervenor-Respondent.

PETITION FOR REHEARING OF ORDER ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

CARL L. SHIPLEY
1204 National Press Building
Washington, D. C. 20004
Attorney for Petitioners

OF COUNSEL:

Shipley, Akerman & Pickett
1204 National Press Building
Washington, D. C. 20004

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On April 4, 1966 this Court denied the petition for writ of certiorari in *WWIZ, Inc., et al. v. Federal Communications Commission,* No. 1020, October Term 1965.

Pursuant to Rule 58, Rules of the Supreme Court of the United States, petitioners request a rehearing of said order denying their petition for writ of certiorari, and counsel for petitioners, Carl L. Shipley, of Shipley, Akerman

& Pickett, certifies that said request for rehearing is presented in good faith and not for delay and that the petition is restricted to the grounds specified in Rule 58, i.e., grounds which are confined to intervening circumstances of substantial or controlling effect (e.g. *Sanitary Refrigerator Co. v. Winter*, 280 U.S. 30; *Massey v. United States*, 291 U.S. 608) or to other substantial grounds available to petitioner, although not previously presented (e.g. *Schriber-Schroth Co. v. Cleveland Trust Co.*, 305 U.S. 47).

JURISDICTION

This Court has jurisdiction under Rule 58, Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

Is it a denial of due process for the Federal Communications Commission to use different hearing issues in license renewal application proceedings, on the same allegations of unauthorized transfer of control, to permit findings and conclusions allowing a penalty less than non-renewal of license to one applicant, but only non-renewal to another, where the favored applicant is a competitor whose complaint set in motion the non-renewal proceedings for the broadcast licensee who loses its license?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment 5

". . . No person shall be . . . deprived of . . . property without due process of law . . .".

STATUTE INVOLVED

47 USC 310 (b)

". . . No . . . station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license . . . ex-

cept upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under Section 308 of this title . . . ."

STATEMENT OF CASE

In June 1955 petitioner Schafitz as an individual applied to the Federal Communications Commission for a construction permit for a new standard broadcast station to operate at Lorain, Ohio. After a hearing the application was granted on May 7, 1958, and the station went on the air on October 26, 1958. On September 18, 1958 Schafitz filed with the Commission an application for approval of assignment of his license (WWIZ) to a newly formed corporation, WWIZ, Inc.. of which Schafitz was the sole stockholder. On October 15, 1958 the Commission approved the assignment.

On November 12, 1958 Schafitz entered into a contract to sell 90 of his 200 shares of common stock to the Lorain Journal, with closing deferred until January 28, 1959, for tax reasons. On the same day the corporation sold the Lorain Journal 200 shares of $100 preferred stock. Said transactions were reported to the FCC on the appropriate ownership report form on November 25, 1958 in accordance with the FCC's rules.

Thereafter on May 2, 1961 Schafitz entered into an agreement with the Lorain Journal, subject to FCC approval, to sell to it his remaining 110 shares of WWIZ, Inc. common stock. The agreement was filed with the FCC on May 31, 1961, and on June 5, 1961 an application for transfer of control of WWIZ, Inc. was filed with the FCC.

Subsequent thereto a competitor, Elyria-Lorain Broadcasting Co. (WEOL), petitioned the FCC to deny the WWIZ, Inc. transfer of control application, and on March 1, 1962

the Commission designated not only the WWIZ, Inc. transfer of control application for hearing, but the WWIZ, Inc. pending license renewal application as well.

After protracted hearings the FCC Hearing Examiner issued his Initial Decision granting each of the applications.

The FCC's Broadcast Bureau and WEOL excepted to the Initial Decision, and the Commission, after oral argument, reversed the Initial Decision and denied both applications in a final decision dated March 31, 1964. The U.S. Court of Appeals affirmed on September 8, 1965.

On April 4, 1966 this Court denied a petition for a writ of certiorari.

REASONS FOR GRANTING WRIT ON REHEARING

On March 1, 1962 the Federal Communications Commission designated the application for renewal of broadcast license of WWIZ, Inc., Lorain, Ohio for hearing on a principal issue, among others, of whether the licensee had transferred control of WWIZ, Inc. without the prior consent of the Federal Communications Commission, said issue reading as follows:

> "To determine (a) whether, prior to November 12, 1958, there existed between the parties to the application for transfer of control of WWIZ, Inc., and their principals any agreement or understanding to effectuate a transfer of control of WWIZ, Inc. to the Lorain Journal Company, without the prior consent of the Commission; (b) whether there existed between the parties to said application, and their principals, at the time of the execution of the November 12, 1958 stock transfer contract, any agreement or understanding to effectuate a transfer of control of WWIZ, Inc. to the Lorain Journal, without the prior consent of the Commission; (c) whether there existed between the parties to said application, and their principals, at the time of the transfer of 45% of the authorized common stock of WWIZ, Inc. on January 28, 1959, any agreement or understanding to effec-

tuate a transfer of control of WWIZ, Inc. to the Lorain Journal Company without the prior consent of the Commission; (d) whether the execution and/or consummation of the November 12, 1958 stock transfer contract and/or the simultaneous purchase of 100% of the authorized preferred stock of WWIZ, Inc. by the Lorain Journal Company and/or the maintenance of certain corporate records of WWIZ, Inc. by the Lorain Journal Company and/or the election of certain directors and officers of WWIZ, Inc. on November 12, 1958 and/or certain amendments to the by-laws and code of regulations of WWIZ, Inc. and/or the exercise by the Lorain Journal Company of certain authority over the expenditures of WWIZ, Inc. were designed to effectuate a transfer of control of WWIZ, Inc. to the Lorain Journal Company without the prior consent of the Commission; (e) whether, as a result of the above actions, control of WWIZ, Inc. was transferred to the Lorain Journal Company without the prior consent of the Commission; and (f) whether the Lorain Journal Company has exercised control over WWIZ, Inc. without the prior consent of the Commission."

The principal instigator of the hearing on WWIZ, Inc.'s application for renewal of its broadcast license was the Elyria-Lorain Broadcasting Company, licensee of radio station WEOL, located in Elyria, Ohio, near to Lorain and serving the Lorain market in competition with WWIZ.

Significantly, the only alternatives for decision under the issue as framed was a grant or denial of WWIZ's application for renewal of its broadcast license. Although the Hearing Examiner in his initial decision granted the WWIZ license renewal application, the Federal Communications Commission reversed the initial decision and denied the application in a decision dated March 31, 1964, which was ultimately sustained by the United States Court of Appeals, whose decision in turn was the subject of the petition for writ of certiorari herein, which this Court denied on April 4, 1966. The petition for writ of certiorari was filed in this Court on February 15, 1966.

After WEOL had successfully brought about the denial

of the application for renewal of the broadcast license of its competitor in the Lorain, Ohio market, WWIZ, Inc., broadcasting station WEOL in an ironic turn of events found itself hoisted on its own petard.

Upon the complaint of the Lorain Journal Company filed on July 27, 1964 requesting the Federal Communications Commission to deny the renewal application of WEOL on grounds of an unauthorized transfer of control (Elyria-Lorain Broadcasting Co., licensee of WEOL conceded that by December 12, 1960 over 50% of its stock had been transferred without authorization to newcomers upon whose qualifications the Federal Communications Commission had not passed, through a series of small transfers over the period from 1947 to 1960), the Federal Communications Commission on September 29, 1965 designated for hearing the WEOL application for renewal of broadcast license on issues involving an unauthorized transfer of control, which permitted the Hearing Examiner to impose several lesser penalties than outright denial of the renewal application, as contrasted with the "sudden death" issue applied in WWIZ's renewal application hearing, as follows:

"1. To determine whether The Lorain County Printing and Publishing Company assumed control of the licensee of Stations WEOL AM & FM, Elyria, Ohio, in violation of Section 310(b) of the Communications Act of 1934, as amended.

"2. To determine, in light of the evidence adduced pursuant to the first issue listed above, whether a forfeiture in the amount of $10,000 or some lesser sum should be ordered; and whether a Cease and Desist Order should be issued.

"3. To determine, in light of the evidence adduced pursuant to the first and second issues listed above, whether any grant of the renewal applications should be subject to the condition that The Lorain County Printing and Publishing Company divest itself of any or all its interest in the licensee.

"4. To determine, in light of the evidence adduced pursuant to the foregoing issues, whether a grant of the

above-captioned applications would serve the public interest, convenience, and necessity."

Thereafter, the Lorain Journal on October 15, 1965 filed a petition with the Federal Communications Commission to modify the Hearing Order to include not only a *de facto* transfer of control, but any *de jure* transfer of control, on grounds that the Federal Communications Commission's stated policy in *Melody Music, Inc. v. FCC*, 345 F.2d 730, 4 R.R.2d 2020, requires equal treatment of applicants charged with similar violations of the FCC's rules, i.e., unauthorized transfer of control. On February 7, 1966, the Commission denied said petition and on February 24, 1966 the Commission denied a request that WEOL be required to produce the same documents and papers which it had required WWIZ to produce, and which formed the basis for the Federal Communications Commission's ultimate decision denying WWIZ's license renewal application.

An evidentiary hearing in the WEOL proceeding was held on March 17, 1966 and the record was closed on April 7, 1966. Petitioners were not in a position on February 15, 1966, when they filed their petition for writ of certiorari herein, to know that the Federal Communications Commission would ultimately let the WEOL renewal application go to hearing on a "favored" basis respecting unauthorized transfer of control issues and production of documentary evidence relating thereto. Petitioners can only speculate as to what the result might have been had the WWIZ license renewal application gone to hearing on the same issues involving lesser penalties than outright non-renewal, as were framed in the WEOL proceeding, or as to the outcome absent the documentary evidence the Federal Communications Commission required WWIZ to produce but would not require WEOL to produce involving day to day operations and other matters relating to *de facto* and *de jure* control without Federal Communications Commission permission. Petitioners respectfully submit that there is a certain elementary fair play

guaranteed by the Federal Constitution to applicants before the Federal Communications Commission. In *South Florida Television Corporation v. Federal Communications Commission*, 349 F.2d 971, Judge J. Skelly Wright, in his dissent took cognizance of the fact that the Federal Communications Commission has historically given a preference position to a license holder in a renewal proceeding:

> ". . . the Commission held that intervenor had the status 'of a licensee seeking renewal of its license . . . albeit occupying a less favorable position than that which one seeking renewal normally holds.' L. B. Wilson, Inc., 37 FCC 511, 515, 3 P&F RR 2d 61, 62 (1964)."

Judge Wright made it clear that the Commission follows a policy of giving a preferential position to a license holder, citing *Wabash Valley Broadcasting Corporation*, 1 P&F RR 2d 573; and *Hearst Radio, Inc.*, 6 P&F RR 994, as examples of this policy.

Petitioners respectfully submit to this Court that such factors as a subsequent conflict in the decisions of United States Courts of Appeal in different circuits, subsequent and intervening constitutional amendments, or the improbability of a conflict in circuits on an important federal question, are no different in substance or degree in their effect than is a conflict in the Federal Communications Commission with itself in respect of using different issues permitting of different types of penalties in license renewal application proceedings.

Since there is only one Federal Communications Commission, the situation respecting WWIZ is similar to that in *Schriber-Schroth Co. v. Cleveland Trust Co.*, 305 U.S. 47, 50, where this Court granted certiorari on rehearing on substantial grounds available to the petitioner, although not previously presented, to wit, the improbability of a conflict in decisions between United States Courts of Appeals in different circuits due to the concentration of the automobile industry in the Sixth Circuit. There is a sub-

stantial conflict between what, by comparison, is the "favored" treatment given station WEOL in terms of issues and the decision framing issues for WWIZ on a "sudden death" basis in its license renewal proceeding on allegations of unauthorized transfer of control.

Petitioners allege and verily believe that they have a constitutional right to equal treatment under the law and that this Court should take jurisdiction to determine on writ of certiorari whether WWIZ is entitled to a rehearing before the Federal Communications Commission on the same type of unauthorized transfer of control issues as were framed for its competitor WEOL, the instigator of the adverse Federal Communications Commission action, which led to the denial of the WWIZ license renewal application on grounds of unauthorized transfer of control.

Respectfully submitted,

CARL L. SHIPLEY
1204 National Press Building
Washington, D. C. 20004
Attorney for Petitioners

Of Counsel:

Shipley, Akerman & Pickett
1204 National Press Building
Washington, D. C. 20004